COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2018-P-0567

MATTHEW Q. CHRISTENSEN and
KIRK P. ALLEN,

Appellants

Vs.

SHAWN E. COX,

Appellee

BRIEF OF THE APPELLANTS MATTHEW Q. CHRISTENSEN AND KIRK P. ALLEN

SCOTT C. FORD, BBO #629280
ALEC J. ZADEK, BBO #672398
MACKENZIE A. QUEENIN, BBO #688114
PATRICK E. MCDONOUGH, BBO # 685847
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
Tel: (617) 542-6000
Fax: (617) 542-2241

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

TREATISES

STATEMENT OF THE ISSUES

(1) Can G.L. c. 272, § 99(Q) apply to a defendant's out-of-state conduct?

(2) Can legal conduct constitute a violation of G.L. c. 214, § 1B?

(3) Is G.L. c. 272, § 99(Q) the exclusive remedy for harm caused to a person by another person's secret recording of their conversation with each other?

STATEMENT OF THE CASE

On October 23, 2017, Appellants Kirk Allen and Matthew Christensen (together "Appellants") filed the underlying complaint against Appellee Shawn Cox, alleging violations of the Massachusetts Wiretap Act (G.L. c. 272, § 99) and the Massachusetts Privacy Act (G.L. c. 214, § 1B). Record Appendix ("RA") 1-9. Mr. Cox moved to dismiss all of the claims against him. RA 18-19. Appellants opposed Mr. Cox's motion. RA 47-58. On January 30, 2018, the Honorable Judge Mitchell Kaplan heard argument on the motion and, thereafter, granted Mr. Cox's motion to dismiss. RA 113-121. The Superior Court dismissed the complaint in its entirety. RA 122. Appellants filed a notice of appeal of Judge Kaplan's decision on February 26, 2018. RA 2.

STATEMENT OF FACTS

Mr. Cox secretly recorded three telephone calls with his former colleague and friend, Mr. Allen, and two calls with his former employer and friend, Mr. Christensen, even after he was denied permission to do so. RA 4-6. Mr. Christensen's company Rose Park Advisors, LLC ("Rose Park") employed Mr. Cox for approximately three years. RA 4. Rose Park provides investment advisory services to another entity co-owned by Mr. Christensen, Disruptive Innovation GP, LLC ("Disruptive Innovation"). Mr. Allen is currently and was at all relevant times employed by Rose Park as well. Mr. Cox's employment with Rose Park ended on good terms.

After Mr. Cox's employment ended, he asserted to Mr. Allen and Mr. Christensen that he owned a part of Disruptive Innovation. RA 4. Mr. Christensen disagreed with Mr. Cox, but believed their disagreement was an honest misunderstanding that they, with the help of Mr. Allen, could resolve. RA 4.

Mr. Allen and Mr. Cox discussed this misunderstanding on at least three occasions: October 23, 2015, May 16, 2016, and August 3, 2016. RA 4-5. For all three of the calls, Mr. Allen was present at Rose Park and Disruptive Innovation's office in Boston. RA 4-

5. Mr. Allen resides in Boston. RA 4. Mr. Christensen, who resides in Belmont, Massachusetts, joined Mr. Allen for the May and August calls, and was in Massachusetts for the May call. RA 5-6. Mr. Cox secretly recorded all three conversations without Mr. Allen's or Mr. Christensen's consent. RA 5-6. Mr. Cox has stated that he was in Utah at the time of all three conversations. RA 5-6.

Mr. Allen and Mr. Christensen believed their conversations with Mr. Cox were private, and they were justified in that belief. RA 6-7. Fifty minutes into the first conversation in October, Mr. Cox asked Mr. Allen if he could record the call. RA 5. Mr. Allen said that he did not want the call recorded, to which Mr. Cox responded, "ok, alright, no worries, no worries then, sorry," implying that he had not recorded the call so far and would not record their conversation going forward. RA 5.

The parties were unable to resolve their disagreement during the course of their three conversations and their dispute resulted in litigation, which is currently pending in Suffolk Superior Court, Clayton M. Christensen et al. v. Cox, Civ. A. No. 1784-CV-01635 (the "Fiduciary Dispute"). Mr. Allen is not a

party to the Fiduciary Dispute. In that action, Mr. Christensen, Dr. Clayton Christensen,[1/] and Rose Park and Disruptive Innovation alleged claims against Mr. Cox for breach of fiduciary duty and unilateral mistake, and sought a declaratory judgment. RA 124. Dr. Christensen also alleged claims against Mr. Cox for violations of the Wiretap Act and Privacy Act arising from Mr. Cox's separate, but also secret, recording of a conversation with Dr. Christensen. RA 124. In the course of discovery in the Fiduciary Dispute, Mr. Allen and Mr. Christensen discovered that Mr. Cox had secretly recorded their three conversations that are now at issue in this case.

On November 20, 2017, the Honorable Judge Edward Leibensperger granted Mr. Cox's motion to dismiss Dr. Christensen's claims for violation of the Wiretap Act and Privacy Act in the Fiduciary Dispute. RA 124-139. Judge Leibensperger's Order served as the basis for Mr. Cox's motion to dismiss Appellants' Wiretap Act and Privacy Act claims in this case. RA 115-121. Judge Kaplan adopted Judge Leibensperger's reasoning and determination as the basis for his decision to dismiss Appellants' Wiretap Act and Privacy Act claims against

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1/ Dr. Christensen, with Mr. Christensen, co-owns Rose Park and Disruptive Innovation.

Mr. Cox. RA 121 ("For the reasons expressed in Judge Leibensperger's decision of November 20th, 2017, the claims asserted in this second filed action . . . are dismissed for exactly the reasons expressed in Judge Leibensperger's decision . . . .").

SUMMARY OF ARGUMENT

The trial court's order dismissing Appellants' allegations against Mr. Cox for violation of the Wiretap Act and Privacy Act was predicated on three errors, each sufficient on its own to warrant reversal of the court's order.

First, the trial court's dismissal of Appellants' Wiretap Act claim rests on the faulty premise that "nothing in the wiretap statute suggests any intention to regulate conduct outside the bounds of the Commonwealth." The trial court held without further analysis that the Wiretap Act thus could not apply to Mr. Cox's out-of-state, unauthorized recording of Appellants. This was incorrect. Where a statute (like the Wiretap Act) is silent as to its extraterritorial effect, courts should determine its application to out-of-state conduct by using a choice-of-law analysis. Because the trial court did not conduct the requisite analysis, and because the Massachusetts functional

choice-of-law analysis favors the extraterritorial application of the Wiretap Act to Mr. Cox's conduct, this Court should reverse the trial court's dismissal of the Wiretap Act claim.

Second, the trial court erroneously held that "legally recording a telephone conversation is not an invasion of privacy." Mr. Cox's actions were not "legal" by virtue of his out-of-state location. But even if they were technically legal for that reason, Massachusetts has not recognized an exception to the Privacy Act for lawful conduct. Numerous courts have held that lawful conduct may constitute a violation of privacy where it unreasonably and substantially or seriously interfered with a plaintiff's privacy. The trial court thus committed reversible error when it held that Mr. Cox's conduct could not constitute a violation of the Privacy Act because it ostensibly did not constitute a violation of the Wiretap Act. This Court should reverse the dismissal of Appellants' Privacy Act claim on this ground alone.

Moreover, there is another, independent reason why this Court should reverse the trial court's decision on the Privacy Act claim. The trial court erred when it held that the Wiretap Act is the "exclusive statutory

remedy" for the interception of a conversation. A cause of action for eavesdropping has long existed at common law. As technology has advanced, the common law claim has evolved to encompass the unauthorized interception of any communication. The Legislature may have codified this right in the Wiretap Act and enhanced the penalties for it (by, among other things, including a right to recover attorneys' fees), but the Wiretap statute did not abrogate the common law or purport to establish an exclusive remedy.

ARGUMENT

I. STANDARD OF REVIEW

Mr. Allen and Mr. Christensen appeal the dismissal of their Complaint, which this Court reviews *de novo*. Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). This Court must "accept as true the facts alleged in the plaintiffs' complaint as well as any favorable inferences that reasonably can be drawn from them." Galiastro v. Mortg. Elec. Registration Sys., 467 Mass. 160, 164 (2014); Lalchandani v. Roddy, 86 Mass. App. Ct. 819, 822 (2015).

Appellants' allegations will survive Mr. Cox's motion to dismiss if their factual allegations plausibly suggest an entitlement to relief or, put another way,

are sufficient to "raise a right to relief above the speculative level based on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 223 (2011) (quoting Iannacchino v. Ford Motor Co., 451 Mass. 623, 636) (internal quotations omitted).

II. THE TRIAL COURT ERRED WHEN IT HELD THAT THE WIRETAP ACT DID NOT APPLY TO MR. COX'S SURREPTITIOUS RECORDING OF HIS CONVERSATIONS WITH APPELLANTS.

The trial court committed reversible error when it held that the Massachusetts Wiretap Act could not apply to Mr. Cox's conduct simply because he was not physically present in Massachusetts when he surreptitiously recorded his conversations with the in-state Appellants. RA 122, 138-139. The Legislature did not provide guidance on this question within the Wiretap Act and no appellate court has addressed this question directly by applying the current choice-of-law analysis; however, the Supreme Judicial Court has implied that the Wiretap Act can apply extraterritorially. See Comm. v. Picardi, 401 Mass. 1008, 1008 (1988) (the Court assumed, without deciding, that Section 99(O) of the Wiretap Act applied extraterritorially).[2/]

[2/] In the absence of direct guidance on this question, the application of the Wiretap Act by

As a general matter, Massachusetts courts can apply Massachusetts' law to a defendant's out-of-state conduct so long as such application complies with the Commonwealth's choice-of-law doctrine. Dow v. Casale, 83 Mass. App. Ct. 751, 756 (2013); see also Taylor v. Eastern Connection Operating Co., 465 Mass. 191, 198 (2013) (holding that the Massachusetts Independent Contractor statute applied to defendant's extraterritorial conduct); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 (1971) ("A court may not apply the local law of its own state to determine a particular issue unless such application of this law would be reasonable in light of the relationship of the state and of other states to the person, thing, or occurrence involved"). Massachusetts follows a functional approach to resolving choice-of-law questions, as set forth in Bushkin Assocs. Inc. v. Raytheon Co., 393 Mass. 622 (1981). See id. at 631-32; see also Cosme v. Whitin Mach. Works, 417 Mass.

Massachusetts trial courts has been inconsistent. Compare Heffernan v. Hashampour, Civ. A. No. 09-CV-2060-F, 2009 Mass. Super. LEXIS 409, at *5-7 (Mass. Super. Dec. 19, 2009) (holding the Wiretap Act applied to an out-of-state defendant who secretly recorded conversations with in-state plaintiffs), with Marquis v. Google, Inc., No. 11-2808, 2015 WL 13037257 (Mass. Super. Feb. 13, 2015) (holding that the Wiretap Act could not apply to penalize defendant's automated scanning of emails outside of the Commonwealth).

643, 646 (1994); Lou v. Otis Elevator Co., 77 Mass. App. Ct. 571, 584 (2010).

Rather than apply the functional choice-of-law analysis mandated by the Supreme Judicial Court, the trial court here effectively presumed that it could not apply the Wiretap Act to Mr. Cox's out-of-state conduct because "nothing in the wiretap statute suggests any intention to regulate conduct outside the bounds of the Commonwealth." RA 122, 138-139 (citing Comm. v. Maccini, Dkt. No. 06-0873, 2007 Mass. Super. LEXIS 235 (Mass. Super. Apr. 23, 2007).

This is not the law. The Supreme Judicial Court has made clear that no such presumption exists. Taylor, 465 Mass. at 198. When a statute is silent as to its extraterritorial effect, rather, it is incumbent on the trial court to conduct a choice-of-law analysis to determine whether it can and should apply the statute to out-of-state conduct. Id. Here, the trial court erred by failing to perform the requisite analysis. If Appellants allegations are taken as true, the functional choice-of-law analysis favors the application of Massachusetts law to Appellants' claim against Mr. Cox for violation of the Wiretap Act.

A. The Trial Court Mistakenly Eschewed the Choice-of-Law Analysis Mandated in Bushkin and Its Progeny By Assuming the Wiretap Statute Could Not Apply to Out-of-State Conduct.

The trial court's assumption that the Wiretap Act cannot apply to out-of-state conduct - in lieu of a choice-of-law analysis - constitutes reversible error because it contravenes the Supreme Judicial Court's guidance that "when a statute is silent as to its extrastate applicability, as is usually the case, a court may and should as appropriate look to all the relevant choice-of-law considerations as if it were choosing between common law rules." Taylor, 465 Mass. at 198. "There is no . . . presumption against the application of Massachusetts statutes to conduct occurring outside Massachusetts but within the United States." Id. at 198, n. 9.

The Court in Taylor affirmed a long-standing rule in the Commonwealth that where a statute is silent on extraterritorial application (such as the Wiretap Act), that silence does not create a presumption against said application. Taylor, 465 Mass. at 198 (stating "where no explicit limitation is placed on a statute's geographic reach, there is no presumption against extraterritorial application in appropriate circumstances" [emphasis

added]). Rather than focus solely on the locus of the conduct at issue, the Court held, consistent with prior decisions, the trial court must conduct a choice-of-law analysis to determine which state law most appropriately applies to the conduct at issue in the case. See id.; see also O'Connell v. Chasdi, 400 Mass. 686, 689 n. 3 (1987) (noting plaintiff could potentially bring claims against defendant for violations of G.L. c. 12, § 11I even though "most of [the defendant's] objectionable behavior took place outside of Massachusetts" because "the statute does not contain a provision limiting its application in such circumstances"); Gonyou v. Tri-Wire Eng'g Solutions, Inc., 717 F. Supp. 2d 152, 155 (D. Mass. 2010) (dismissing defendant's argument that there is a "presumption against extra-territoriality" when applying a Massachusetts statute to a defendant's out-of-state conduct, and noting that "Massachusetts has applied its statutory law to conduct outside the borders if sufficient contacts with the Commonwealth exist"). Thus, where the choice-of-law analysis warrants the application of Massachusetts law, there is no general prohibition on applying a statute extraterritorially. See, e.g., Taylor, 465 Mass. at 198; O'Connell, 400 Mass. at 689 n. 3; Gonyou, 717 F. Supp. 2d at 155.

Although it predated Taylor, the decision in Heffernan v. Hashampour exemplifies the correct approach for applying the functional choice-of-law analysis detailed in Bushkin and its progeny to the Wiretap Act. See Heffernan v. Hashampour, Civ. A. No. 09-CV-2060-F, 2009 Mass. Super. LEXIS 409, at *3-9 (Mass. Super. Dec. 19, 2009). In Heffernan, the plaintiffs alleged that the defendant secretly recorded conversations with them in violation of the Wiretap Act and Privacy Act. Id. at *1-2. The defendant was in Virginia at the time of the recorded calls. Id. He moved to dismiss plaintiffs' complaint because Virginia law permits one party to record a telephone conversation even without the other party's knowledge. Id. at *2-3. Appellants opposed the motion arguing that Massachusetts law should apply to defendant's conduct rather than Virginia law.

Presented with this choice-of-law question - one which would be dispositive of the motion to dismiss and possibly the entire litigation - the court applied the Supreme Judicial Court's guidance from Bushkin and its progeny. The court first identified Section 152 of the Restatement (Second) of Conflict of Laws ("Section 152") as the section that aligned most closely with the plaintiffs' claims. Id. at *3. Section 152 provides "the

local law of the state where the invasion occurred determines the rights and liabilities of the parties," and explains in Comment c, "when the intrusion involves an intrusion upon the plaintiff's solitude the place of invasion is the place where the plaintiff was at the time." Id. at *6 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 152 (1971)). The court next considered relevant choice-influencing factors, but held that none persuaded it to apply Virginia law because the plaintiffs were located in Massachusetts at the time of the alleged recording. Id. at *7-*8. As a result, the court denied the motion to dismiss. The trial court should have followed a similar approach to the court's analysis in Heffernan. See Bushkin, 393 Mass. at 631-632; Taylor, 465 Mass. at 198.

Thus, under Taylor, where a conflict of law affects the outcome of a case, Massachusetts courts can and should apply Massachusetts' law to a defendant's out-of-state conduct so long as such application complies with the Commonwealth's choice-of-law doctrine. See Taylor, 465 Mass. at 198 (holding that the Massachusetts Independent Contractor statute applied to defendant's extraterritorial conduct). The Wiretap Act's silence on its extraterritorial application does not create a

presumption that the Legislature intended to restrict its application to conduct occurring only in Massachusetts. The trial court's assumption that the Wiretap Act can never apply to a defendant's out-of-state conduct constituted reversible error.

B. The Decisions Cited By the Trial Court Do Not Warrant Deviation From Taylor.

The four decisions cited by the Superior Court to support its refusal to apply the Wiretap Act to out-of-state conduct do not warrant deviation from the Court's guidance in Taylor. RA 121, 137-138 (citing Comm. v. Wilcox, 63 Mass. App. Ct. 131 (2005); Comm. v. Maccini, 22 Mass. L. Rptr. 393 (Mass. Super. Apr. 23, 2007); Marquis v. Google, Inc., Civ. A. No. 11-2808, 2015 WL 13037257 (Mass. Super. Ct. Feb. 13, 2015); MacNeill Engineering Co. v. Trisport, Ltd., 59 F. Supp. 2d 199 (D. Mass 1999)). Wilcox is the only appellate decision in the group, and it is factually distinguishable. In that case, none of the parties involved was present in Massachusetts when the allegedly illicit recording occurred: the criminal defendant in Wilcox appealed the trial court's decision to admit a videotaped interview of him conducted by the Rhode Island State Police, while both he and his interrogators were present in Rhode

Island. Wilcox, 63 Mass. App. Ct. at 139. The choice-of-law calculus is dramatically different in the current matter, where the Appellants are Massachusetts residents and were recorded while speaking in Massachusetts to an out-of-state defendant - who had represented that he would not record their conversations - about their business dealings within Massachusetts.

The remaining other decisions cited by the trial court are state and federal trial court decisions that lack precedential value and either apply the wrong choice-of-law analysis or assume - contrary to the Court's holding in Taylor - that the Wiretap Act does not apply to extraterritorial conduct. The courts in both Maccini and Marquis assumed that the Massachusetts Wiretap Act could not apply to out-of-state conduct. Maccini, 2007 Mass. Super. LEXIS 235, at *5 ("nothing in the wiretap statute suggests any intention to regulate conduct outside the bounds of the Commonwealth"); Marquis, 2015 WL 13037257, at *8 ("The Massachusetts wiretap statute says nothing, one way or the other, about extraterritorial application . . . . there is no reason to suspect that the Massachusetts legislature intended, in 1968 or since, that our statute be applied to out-of-state conduct . . . ."). The Taylor court rejected

the rationale of both decisions. Taylor, 465 Mass. at 198-199.

The decisions in Maccini and Marquis are also factually distinguishable because each involved the preservation of electronic messages rather than secretly recorded phone conversations. See Maccini, 2007 Mass. Super. LEXIS 235, at *4 (defendant challenged interception of email and instant message communications); Marquis, 2015 WL 13037257, at *3-4 (challenging Google's automatic scanning and filtering technology for email messages). The court's decision in Marquis rested upon the distinction between electronic and telephonic communications, stating:

> Emails are distinctly unlike land-line telephone calls in many respects, one being that an email may be sent or received anywhere that has an internet or cellular connection, using highly portable equipment - laptops with WiFi connections, tablets, and mobile phones. They travel from one @-sign "address," wholly unrelated to any geographic location, to another.

Marquis, 2015 WL 13038257, at *8. This distinction underscores why the Marquis distinction does not warrant deviation from Taylor.

In MacNeill, the trial court relied on the decision in Pendell v. AMS/OIL, Inc., Civ. A. No. 84-4108-N, 1986 U.S. Dist. Lexis 26089 (D. Mass. Apr. 30, 1986), to hold

that the location of the defendant who allegedly secretly recorded a call governed the choice-of-law for purposes of prosecuting plaintiff's allegations against the defendant. MacNeill, 59 F. Supp. 2d. at 201. Although the courts in MacNeill and Pendell cited Bushkin in reaching their holding, neither decision applied the guidance set forth in Bushkin to follow a functional approach to resolving choice-of-law disputes. Pendell, 1986 U.S. Dist. Lexis 2608, at *8 (citing Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 333-334 (1983)); MacNeill, 59 F. Supp. 2d. at 201 (citing Pendell). Both courts instead merely held that the "substantive law governing an action for physical injury is that of the place where the injury occurred" and concluded, without analysis, that the place where the injury occurred is the place where the defendant was located when he recorded the call. Pendell, 1986 U.S. Dist. Lexis 26089, at *8 (citing Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 333-334 (1983)); MacNeill, 59 F. Supp. 2d. at 201 (citing Pendell).

By citing Cohen - decided before Bushkin - in rote fashion without turning to the Restatement (Second) of Conflict of Laws (hereinafter the "Restatement"), the courts in Pendell and MacNeill merely replaced one

inflexible, artificial construction rejected by the Supreme Judicial Court (the *lex loci delecti* doctrine) with another. See Bushkin, 393 Mass. at 622-623. Significantly, in Cohen, after the Court noted that Massachusetts typically applies the substantive law of the place where the injury occurred, the Court turned to the Restatement for further guidance. Cohen, 389 Mass. at 336 ("The Restatement (Second) of Conflict of Laws specifically addresses situations where tortious conduct occurred in one State and injury occurred in the other. Comment e to § 146 of the Restatement provides that 'in such instances, the local law of the state of injury will usually be applied to determine most issues involving the tort.'"). The decisions in Pendell and MacNeill cite to the correct precedent, but did not apply it correctly.

C. Massachusetts Choice-of-Law Analysis Mandates the Application of the Wiretap Act to Mr. Cox's Conduct.

The trial court erred by foregoing a choice-of-law analysis and holding that Massachusetts' law could never apply to Mr. Cox's conduct. This Court may now decide the issue *de novo*, and may conduct the choice-of-law analysis that the trial court eschewed, accepting as true Appellants' allegations and drawing all reasonable

inferences therefrom in their favor. Galiastro, 467 Mass. at 164; Lalchandani, 86 Mass. App. Ct. at 822.

1. Massachusetts Choice-Of-Law Analysis Favors the Application of Massachusetts Law to the Surreptitious Recording of Persons Located Inside the Commonwealth By Persons Located Outside It.

As previously discussed, the seminal decision concerning the Massachusetts choice-of-law analysis is Bushkin Assocs. Inc. v. Raytheon Co. In Bushkin, the Supreme Judicial Court decided "not to tie Massachusetts conflicts of laws to any specific choice-of-law doctrine, but [sought] instead a functional choice-of-law approach that responds to the interests of the parties, the States involved, and the interstate system as a whole." Bushkin, 393 Mass. at 631. When explaining the rationale for its decision, the Court noted, "the governing principles of law should hardly turn on a parsing of the disputed content of a telephone call or, more importantly, on the fortuitous fact that an oral offer was accepted orally in one State rather than in the other." Id. (emphasis added).

The Court's rationale in Bushkin is particularly relevant to the choice-of-law analysis in this dispute. Here, the governing law - and the protections afforded by it to Massachusetts residents - should not turn on

the fortuitous fact that Mr. Cox was in Utah at the time he recorded his conversations with Mr. Allen and Mr. Christensen. RA 6-7. Similarly, the Court in Bushkin addressed the analogous scenario where a New York plaintiff alleged an oral agreement with a Massachusetts defendant for a finder's fee arising from the successful closing of a merger transaction. Bushkin, 393 Mass. at 624-625. The defendant argued that New York's statute of frauds precluded the alleged oral agreement, which the defendant believed applied because the agreement was accepted in New York. Id. The Court rejected this logic, instead holding that the law of Massachusetts applied because it was the law that would "carry out and validate the transaction in accordance with intention, in preference to a law that would tend to defeat it." Id. at 636.

The Supreme Judicial Court established a flexible choice-of-law analysis in Bushkin; however, courts interpreting it have determined there are two general steps. The first step is to consider whether the choice between laws of the involved jurisdictions will affect the legal result. Lou, 77 Mass. App. Ct. 571. If the choice of law will affect the legal result, the next step is for the court to assess the functional analysis

using the Restatement as a guide. Cosme, 417 Mass. at 646. There is no dispute that this first step is satisfied, as Mr. Cox says that he was in Utah when he surreptitiously recorded the Appellants, and the Utah wiretap law permits the conduct at issue, whereas Massachusetts law does not.

Under the second step, the Restatement often guides Massachusetts courts to determine the applicable choice-influencing considerations. See, e.g., Bushkin, 393 Mass. at 631 ("One obvious source of guidance is the Restatement (Second) Conflict of Laws"); Lou, 77 Mass. App. at 584 ("examination of our cases reveals that we often find useful guidance in the Restatement (Second) of Conflict of Laws"). After identifying the relevant section of the Restatement, courts will examine case-specific choice-influencing factors, including (a) the relevant policies of the forum; (b) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; and (c) the protection of justified expectations. See Cosme, 417 Mass. at 647.

The previously discussed Heffernan decision reflects a straightforward application of the choice-of-law analysis described in Bushkin, based on guidance

from the Court in subsequent decisions, such as Cosme. Indeed, the Court's rationale in Bushkin - "the governing principles of law should hardly turn . . . on the fortuitous fact that an oral offer was accepted orally in one State rather than in the other" - was equally applicable to the facts of Heffernan. See Bushin, 393 Mass. at 631.

As in Bushkin and Heffernan, this dispute should not turn on the fortuitous fact that Mr. Cox secretly recorded his conversations with Mr. Allen and Mr. Christensen from Utah. The trial court erred by applying Utah law without analyzing any functional considerations, effectively supplanting the analysis mandated by Bushkin with an artificial construction akin to the outdated *lex loci* approach the Bushkin court explicitly rejected. See Bushkin, 393 Mass. at 631-632.

2. The Functional Choice-Of-Law Analysis, When Applied to Appellants' Allegations, Favors Application of the Wiretap Act to Mr. Cox's Secret Recording.

There is a conflict between the law of Massachusetts and the law of Utah concerning the surreptitious recording of an oral conversation. Compare G.L. c. 272, § 99 (declaring it unlawful to record a conversation unless all parties to the conversation

consent to the recording), with UTAH CODE ANN. § 77-23a-4(7)(b) ("A person not acting under the color of law may intercept a wire, electronic, or oral communication if that person is a party to the communication or one of the parties to the communication has given prior consent to the interception . . . ."). Once the court identifies a conflict in law - as it did here - the next step in the choice-of-law analysis is to identify guidance concerning which jurisdiction's law to apply. See Cosme, 417 Mass. at 646. The Restatement remains an "obvious" and "useful" resource for this part of the analysis. Bushkin, 393 Mass. at 632 (identifying the Restatement as an "obvious" source of guidance); Lou, 77 Mass. App. at 584 (noting that Massachusetts courts often find the Restatement "useful" to determine the correct choice of law).

Section 152 provides instruction concerning the choice of law when privacy rights are at issue:

> In an action for an invasion of a right of privacy, the local law of the state where the invasion occurred determines the rights and liabilities of the parties, except as stated in § 153, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 152 (1971).[3/] Section 152 is applicable here because, at its core, the civil remedy authorized by G.L. c. 272, § 99(Q), represents the codification of a limited right to privacy and a remedy against those who invade a plaintiff's privacy. See G.L. c. 272, § 99(Q) ("Any aggrieved person whose oral or wire communications were intercepted . . . shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest . . . ." [emphasis added]); see also In re Opinion of Justices, 336 Mass. 765, 770 (1967) ("The use of dictagraphs and dictaphones and the tapping of wires are modern phases of eavesdropping, which was a crime at common law."); Comm. v. Publicover, 327 Mass. 303, 305 (1951) ("This is but a development dealing with a modern phase of eavesdropping, which was a crime at common law.") (citing 1 BISHOP, CRIMINAL LAW (9th Ed.), §§ 540, 1122-1124, and others). Indeed, no other provision of

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[3/] Section 153 of the Restatement (Second) of Conflict of Laws applies to multistate invasions of privacy. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 153 (1971). Even in such a circumstance, the applicable law "will usually be the state where the plaintiff was domiciled at the time if the matter complained of was published in that state." Id.

the Restatement is as applicable or on-point as to Wiretap Act claims.

According to Section 152, the "law of the state where the invasion occurred determines the rights and liabilities of the parties." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 152 (1971). Reading Section 152 together with its comments establishes that the Restatement instructs that, where there is an invasion of someone's privacy, the local law of the place where the plaintiff was located at the time of the invasion should govern the choice of law:

> Comment c: "*Place of invasion.* When the invasion involves an intrusion upon the plaintiff's solitude, the place of the invasion is the place where the plaintiff was at the time."
>
> Comment f: "*When the defendant's conduct and the invasion occur in different states.* On occasion, the defendant's conduct and the invasion of the plaintiff's privacy will occur in different states, such as when the defendant in state X speaks over the telephone to a person in state Y and gives him private information concerning the plaintiff. In such instances, the local law of the state where the invasion of privacy occurred will usually be applied to determine most issues involving the tort . . . . One reason for the rule is that persons who cause injury in a state should not ordinarily escape liability imposed by the local law of that state on account of the injury. Moreover, the place of the invasion will usually be readily ascertainable. Hence the rule is easy to apply and leads to certainty of result."

> Comment f (continued): "The local law of the state where the invasion of privacy occurred is most likely to be applied when the plaintiff has a settled relationship to that state, either because he is domiciled or resides there or because he does business there."

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 152, cmts. c, f (1971) (emphasis added).

The "place of invasion" in this case is Massachusetts. Mr. Allen was in Massachusetts for all three secretly recorded calls and Mr. Christensen for one call. RA 5-6. Mr. Allen and Mr. Christensen also reside and do business in Massachusetts. RA 3-4. There are no allegations that would warrant holding the "place of invasion" to be anywhere other than Massachusetts.

The choice-of-law principles set forth in Section 6 of the Restatement reaffirm the conclusion that Massachusetts law should apply. Section 6 of the Restatement states:

> **§ 6 Choice of Law Principles**
>
> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). Appellants' allegations, which must be accepted as true at this stage of the pleadings, implicate two choice-influencing considerations: the "protection of justified expectations" of the parties, and the relevant policies and interests of Utah and Massachusetts. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(c), (d) (1971).

First, Mr. Allen and Mr. Christensen undeniably had a justified expectation that Mr. Cox would not record their conversation; on the other hand, Mr. Cox had no legitimate basis for assuming that his secret recording was protected behavior. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d) (1971) (stating one relevant factor includes "the protection of justified expectations"). To

be sure, Mr. Cox requested permission to record his conversation with Mr. Allen, but Mr. Allen expressly denied Mr. Cox's request, and Mr. Cox then represented that he would not record their conversation. RA 5. Mr. Cox thus acted knowingly without permission and in breach of his explicit promise to Mr. Allen, when he recorded their entire first conversation, and when he recorded two subsequent conversations with Mr. Allen. RA 5-6. Thus, the trial court should have chosen Massachusetts law in order to honor and enforce Mr. Cox and Mr. Allen's agreement that Mr. Cox would not record their conversation. Bushkin, 393 Mass. at 636 ("In this case, the law that will validate the agreement, if indeed there was an agreement, is that of Massachusetts.").

The balance of Utah and Massachusetts' respective interests also weighs in favor of applying the Massachusetts Wiretap Act to Mr. Cox's out-of-state conduct. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(c) (1971). The purpose of Utah's wiretap act is, among other things, to "safeguard the privacy of innocent persons" by limiting the interception of communications "when none of the parties to the communication has consented to the interception" only when authorized by a court of competent jurisdiction. UTAH CODE ANN. § 77-23a-2(4). The

Massachusetts Wiretap Act similarly aims to protect the privacy of its citizens. The Preamble to the Wiretap Act states, in part:

> The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave damages to the privacy of all citizens of the Commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited.

G.L. c. 272, § 99(A).

Utah and Massachusetts both have an interest in protecting the privacy of their citizens - it is the purpose of their respective statutes. But Mr. Cox has not invoked Utah law to protect his privacy, but rather so that he may invade Appellants' privacy, shield himself from Appellants' claims that he invaded their privacy, and attempt to employ the recordings he obtained through his deception to gain an advantage in the Fiduciary Dispute. Certainly, Utah has no interest in the manipulation of its laws to legitimize the deception of citizens in other states, especially where, as here, Mr. Cox told Mr. Allen that he would not record their call. In contrast, Massachusetts has a clear interest in protecting the privacy of its own citizens, irrespective of where the person violating the citizen's privacy is physically located. See G.L. c. 272, §99(A)

("The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave damages to the privacy of all citizens of the Commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited."). In this case, the choice-influencing factors of Section 6 of the Restatement tip in favor of Massachusetts law. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(c)-(d) (1971).

The purpose of the choice-of-law analysis is to "reach a fair result in a given case." Bushkin, 393 Mass. at 631. Mr. Cox's deception renders such an outcome impossible absent the application of Massachusetts law.

3. The Dual Criminal and Civil Nature of the Wiretap Act Does Not Obviate the Functional Choice-of-Law Analysis.

The fact that the Wiretap Act contains both civil remedies and criminal penalties does not change the analysis. As with civil statutes, there is no prohibition on the extraterritorial application of Massachusetts criminal statutes. See Vasquez, petitioner, 428 Mass. 842, 847-49 (1999) (declaring a "[s]tate is not deprived of jurisdiction over every criminal case in which the defendant was not physically present within the State's borders when the crime was

committed"); see also Comm. v. Thompson, 89 Mass. App. Ct. 456, 470 (2016) (declaring prosecution in Massachusetts is not "barred by the general rule, accepted as axiomatic by the courts in this country, that a State may not prosecute an individual for a crime committed outside its boundaries" [internal quotations omitted]). This canon, otherwise known as the "effects doctrine," states that where a defendant's out-of-state conduct causes a "detrimental effect" within the Commonwealth, the Commonwealth may hold the defendant accountable under Massachusetts law. Vasquez, 428 Mass. at 847-849.

The critical inquiry for determining whether the Commonwealth has jurisdiction in a criminal matter is not where the violative conduct occurred, but whether the actor "intended to produce and produced detrimental effects within" the Commonwealth. Thompson, 89 Mass. App. Ct. at 470 (quoting Vasquez, 428 Mass. at 848-49). Applying the effects doctrine, the Commonwealth has exercised jurisdiction over the out-of-state commission of, among other offenses, credit card fraud, witness intimidation, and forgery with an intent to defraud. Comm. v. Kinney, 84 Mass. App. Ct. 1123, 1123 (2013) (1:28 decision) (credit card fraud); Comm. v. Nurse, 87

Mass. App. Ct. 1129, 1129 (2015) (1:28 decision) (witness intimidation); Comm. v. Levin, 11 Mass. App. Ct. 482, 502 (1980) (forgery with an intent to defraud).

Reading Taylor and the "effects doctrine" cases together shows that even a blended statute containing both criminal and civil remedies, like the Wiretap Act, can apply to extraterritorial conduct. The trial court should have looked to the relevant choice-of-law considerations "as if it were choosing between common law rules," rather than just assuming that the Wiretap Act could not apply to Mr. Cox's conduct. Taylor, 465 Mass. at 198.

In sum, the trial court committed reversible error by holding that the Wiretap Act could not apply to Mr. Cox's out-of-state conduct absent an express statement in the statute constraining its scope. For that reason alone, the Court should reverse the dismissal of Appellants' Wiretap Act claims.

III. THE TRIAL COURT ERRED WHEN IT HELD THAT LEGAL CONDUCT COULD NOT CONSTITUTE A VIOLATION OF THE PRIVACY ACT.

The trial court erred for two reasons when it held that "legally recording a telephone conversation is not an invasion of privacy." RA 138. First, as discussed supra at pp. 8-40, Appellants have adequately pled that

Mr. Cox's conduct was not "legal" under the Wiretap Act by virtue of the fact that he invaded Appellants' privacy in Massachusetts. Thus, the trial court's rationale here lacks a valid premise.

Second, even if Mr. Cox's conduct was technically "legal" under the Wiretap Act, such a finding does not make it exempt from liability under the Privacy Act. The Privacy Act protects against the "unreasonable, substantial or serious interference with a person's privacy." G.L. c. 214, § 1B. A plaintiff may therefore "support a claim of invasion of privacy by showing that a defendant has intruded unreasonably upon the plaintiff's 'solitude' or 'seclusion.'" Polay v. McMahon, 468 Mass. 379, 382 (2014) (emphasis added). The legality (or illegality) of the means used to invade the plaintiff's privacy may (or may not) affect the reasonableness of a particular invasion, but there is no blanket exception to the Privacy Act for technically lawful conduct. See Bratt v. International Business Machines Corp., 392 Mass. 508, 519-520 (1984) ("Massachusetts case law does not recognize a conditional privilege, as such, for legitimate business communications under the right of privacy statute.").

To the contrary, Massachusetts' courts have repeatedly recognized claims for violation of the Privacy Act for otherwise legitimate or lawful conduct. See, e.g., Polay, 468 Mass. at 383-385 (defendant's installation of security cameras on own property but aimed at plaintiff's property constituted valid claim for "substantial or serious intrusion" under G.L. c. 214, § 1B); Ellis v. Safety Ins. Co., 41 Mass. App. Ct. 630, 637-38 (1996) (evidence that defendant followed and called plaintiff created sufficient dispute of material fact to overcome summary judgment); E.T. v. Bureau of Special Educ. Appeals of the Div. of Admin. Law Appeals, 91 F. Supp. 3d 38, 53 (D. Mass. 2015) (defendants' examination and copying of plaintiff's private notebook constituted valid claim for unreasonable and substantial or serious invasion under G.L. c. 214, § 1B).

"Generally, whether an intrusion qualifies as unreasonable, as well as either substantial or serious, presents a question of fact." Polay, 468 Mass. at 383 (citing Ellis, 41 Mass. App. Ct. at 638). Relevant factors for this determination include the "location of the intrusion, the means used, the frequency and duration of the intrusion, and the underlying purpose behind the intrusion." Id. Courts will "balance the

extent to which the defendant violated the plaintiff's privacy interests against any legitimate purpose the defendant may have had for the intrusion." Id.; see also Bratt, 392 Mass. at 520-21.

The decision in Polay is instructive here. The Supreme Judicial Court vacated the dismissal of the plaintiff's Privacy Act claim and remanded the case to allow the fact finder to balance the defendant's lawful, but arguably unreasonable, conduct against the plaintiff's privacy interests. Polay, 392 Mass. at 385; cf. Ellis, 41 Mass. App. Ct. at 638 (trial judge committed reversible error in granting summary judgment on plaintiff's claim and remanding to allow fact-finder to determine whether intrusion was unreasonable and substantial or serious). In Polay, the plaintiffs alleged that the defendant installed video cameras on his property for the purpose of harassing and surveilling the plaintiffs. Polay, 392 Mass. at 384. The defendant argued that he intended the cameras merely to protect his property and not to harass the plaintiffs. Id. at 384. The defendant's action were not illegal, but the Supreme Judicial Court held that "whether the defendant acted for the legitimate purpose of securing his property in a way that outweighs any incidental

intrusion on the plaintiffs' privacy interest is, however, a question of fact not suitable for resolution on a motion to dismiss." Id. at 384-385.

In Ellis, the Appeals Court reversed the entry of summary judgment for the defendants, where plaintiffs alleged that defendants invaded their privacy by "following them around Boston in an impermissibly intrusive and suggestive manner" and, on other occasions, asking her on the telephone, "How can you black people afford this type of expensive car?" Ellis, 41 Mass. App. Ct. at 637-638. Again, the defendant's behavior was not illegal, in and of itself, but the Court held that whether the alleged conduct was sufficient to give rise to a violation of the privacy act was a question for the trier of fact, and thus inappropriate for summary judgment. Id. at 638.

In this matter, even if Mr. Cox's actions were technically legal by virtue of his out-of-state location, the trial court should not have dismissed Appellants' privacy claims on a motion to dismiss. See Polay, 468 Mass. at 384-85 (reversing the dismissal of a Privacy Act claim); Heffernan, 2009 Mass. Super. LEXIS, at *10 (denying defendant's motion to dismiss because alleged recording of telephone call by defendant

without plaintiffs' knowledge was sufficient to plead claim for violation of G.L. c. 214, § 1B). Appellants alleged that Mr. Cox recorded three conversations with them after Mr. Cox stated that he would not record his conversation with Mr. Allen. RA 5-6. The recordings include discussions of Mr. Allen's and Mr. Christensen's personal lives as well as Mr. Cox's belief that he owned a part of Mr. Christensen's closely-held business. In light of Mr. Cox's false confirmation that he did not record his conversation with Mr. Allen and of his knowledge that Mr. Allen did not want him to record their calls, Mr. Cox had no legitimate interest in recording the conversations (indeed, his only interest was to deceive Mr. Allen and Mr. Christensen and attempt to secure unwitting support for Mr. Cox's claims now alleged in the Fiduciary Dispute). At a minimum, the Complaint alleged a substantial and unreasonable invasion of privacy and was sufficient to survive a motion to dismiss.

IV. THE TRIAL COURT ERRED WHEN IT HELD THE WIRETAP ACT WAS THE EXCLUSIVE REMEDY FOR A PLAINTIFF WHOSE CONVERSATION WAS ILLEGALLY INTERCEPTED.

The trial court committed reversible error when it dismissed Appellants' Privacy Act claims based on the conclusion that the Wiretap Act was the exclusive remedy

for a plaintiff who had his conversation illegally intercepted. The trial court's ruling infers a nonexistent legislative intent to create an exclusive remedy, thereby precluding the harmonious interpretation of the Wiretap and Privacy Acts.

A. The Legislature Did Not Intend the Wiretap Act To Be An Exclusive Remedy.

Courts may not deem that a statute replaces a common-law right unless the Legislature clearly intended such a result. Passatempo v. McMenimen, 461 Mass. 279, 290 (2011) ("we have long held that a statutory repeal of the common law will not be lightly inferred; the Legislature's intent must be manifest.") (quoting Comey v. Hill, 387 Mass. 11, 20 (1982); Lipsitt v. Plaud, 466 Mass. 240, 244 (2013) ("It is well established that an existing common law remedy is not to be taken away by statute unless by direct enactment or necessary implication."); see also Comey v. Hill, 387 Mass. 11 (1982) (concluding that G.L. c. 151B was not meant to be an exclusive remedy). "Accordingly, the mere adoption by the Legislature of a common-law remedy does not, without more, prevent the continued evolution of the common law." Passatempo, 461 Mass. at 290; see also NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION,

§ 50:5, at 178 (7th Ed. Rev. 2012) (stating presumption is "a statute is consistent with the common law, and so a statute creating a new remedy or method to enforce a right which existed before is regarded as cumulative rather than exclusive of previous remedies.").

In 1920, when the Legislature first promulgated the Wiretap Act, it directed the Act at individuals who secretly overheard or had any other person secretly overhear spoken words by using a device for purposes of divulging the intercepted communication. See 1920 Mass. Acts Ch. 558, § 1. The Wiretap Act included a civil remedy for any person injured because of the interception of their conversation. Id. The civil remedy was not a new right created by the Legislature. The Legislature merely codified the common law. Berger v. New York, 388 U.S. 41, 45 (1967) ("eavesdropping is an ancient practice which at common law was condemned as nuisance") (citing 4 Blackstone, Commentaries 168).[4/] The

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[4/] Berger v. New York was ultimately codified and superseded by Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520, which was enacted to regulate domestic electronic surveillance. See United States v. Koyomejian, 946 F. 2d 1450, 1454-55 (9th Cir. 1991). Congress enacted Title III because it concluded that Berger offered "inadequate protection" for individual privacy. Id. However, Berger remains good law for the reasoning cited above.

common law developed with the invention of the telephone and many states provided statutory remedies to protect individual privacy further. See Publicover, 327 Mass. at 305 ("This is but a development dealing with a modern phase of eavesdropping, which was a crime at common law.") (citing 1 BISHOP, CRIMINAL LAW (9th Ed.), §§ 540, 1122-1124, and others); In re Opinion of Justices, 336 Mass. at 770 ("The use of dictagraphs and dictaphones and the tapping of wires are modern phases of eavesdropping, which was a crime at common law").

In 1968, the Legislature substantially amended the Wiretap Act after the Supreme Court decided Berger v. New York, which held an analogous New York wiretap statute was unconstitutional. COMM. OF MASS., INTERIM REPORT OF THE SPECIAL COMMISSION TO INVESTIGATE ELECTRONIC EAVESDROPPING AND WIRETAPPING, No. 1132, at 5 (June 1968). As part of the revision to the Wiretap Act, the Legislature criminalized the recording of a conversation without consent of all parties to the conversation and increased the penalties for both the criminal and civil violations of the statute. Id. at 9 ("The present Massachusetts laws have been revised in our proposed act to strictly prohibit electronic eavesdropping and wiretapping of other persons' conversations without permission.

Penalties have been increased and the crimes have been more strictly defined."). The Wiretap Act has remained materially the same since the Legislature's amendment in 1968. It does not purport to be the exclusive remedy for the electronic interception of conversations nor does it preclude any remedies previously available at common law. See generally G.L. c. 272, § 99(Q).

In similar instances, where the Legislature acted to enhance remedies provided by common law, the Court has held that such legislation did not repeal the common-law remedy. For instance, in Lipsitt, the Court held that the Wage Act "was designed to enhance the rights of employees with respect to the payment of wages," and the Legislature did not intend to abrogate the common-law cause of action for nonpayment of wages. Lipsitt, 466 Mass. at 248-249. See also Charland v. Muzi Motors, Inc., 417 Mass. 580, 559 (1994) (stating "we therefore conclude that, where applicable, G.L. c. 151B provides the exclusive remedy for employment discrimination not based on preexisting tort law or constitutional protections . . . ." [emphasis added]); Passatempo, 461 Mass. at 291 (holding that G.L. c. 175, § 181 did not preempt the common-law development of alternate remedies

against insurance companies that misrepresent the terms of the policies they sell).

Because the Legislature did not express a manifest intent to create an exclusive remedy for eavesdropping when it enacted the Wiretap Act and subsequently revised it, the trial court should not infer that the Legislature intended to establish such an exclusive remedy.

B. The Wiretap Act and Privacy Act Provide Cumulative Remedies.

The Legislature enacted the Privacy Act in 1973, more than fifty years after it enacted the Wiretap Act and five years after it had substantially amended the Wiretap Act. Thus, courts may presume that the Legislature knew of the Wiretap Act when it enacted the Privacy Act. See Thurdin v. SEI Boston, LLC, 452 Mass. 436, 444 (2008) ("We also assume the Legislature is aware of existing statutes when it enacts subsequent ones.") (citing Green v. Wyman-Gordon Co., 422 Mass. 551, 554 (1996)).

Both the Wiretap Act and Privacy Act create causes of actions arising from the invasion of an individual's privacy. See G.L. c. 272, § 99(Q) (a person "shall have a civil cause of action against any person who so . . . violates his personal, property or privacy interest");

G.L. c. 214, § 1B ("A person shall have a right against unreasonable, substantial or serious interference with his privacy."). Tenets of statutory construction require the harmonious interpretation of both statutes that gives meaning to their provisions. Green v. Wyman-Gordon Co., 442 Mass. 551, 554 (1996).

The trial court erred when it ignored these tenets and held that the Wiretap Act was the exclusive remedy for Appellants. Indeed, if this court affirmed the trial court's holding, it would eliminate recourse for an unreasonable, serious, and substantial invasion of an individual's privacy resulting from recording that individual's conversations merely because the Wiretap Act was deemed inapplicable. For this reason, it is not surprising that numerous trial courts, interpreting Massachusetts law and analyzing dual Wiretap and Privacy Act claims, have allowed both claims to proceed. See, e.g., Mahoney v. Denuzzio, No. 13-11501-FDS, 2014 U.S. Dist. LEXIS 10931, at *14-16 (D. Mass. Jan. 29, 2014) (allowing a motion to amend the complaint to include Wiretap Act and Privacy Act claims and denying a motion to dismiss both counts); Heffernan, 2009 Mass. Super. LEXIS 409, at *7-10 (denying a motion to dismiss Wiretap Act and Privacy Act claims); Bruno v. Mallen, No. 96-

05458, 1998 Mass. Super. LEXIS 157, at *5-7 (Mass. Super. Jan. 20, 1998) (court grants plaintiff's motion for summary judgment on claims for violation of the Wiretap Act, but held that plaintiff's Privacy Act claim based on same facts was not ripe for summary judgment due to different standards applied to Wiretap Act and Privacy Act claims).

Courts interpreting similar statutes in other states have similarly allowed both claims to proceed. See, e.g., Walden v. City of Providence, 495 F. Supp. 2d 245, 260-61 (D. R.I. 2008) (rejecting defendants' contention that plaintiffs were prohibited from simultaneously pursuing federal and state wiretap claims while also pursuing federal and state privacy act claims); Kiessel v. Oltersdorf, No. 1:09-cv-179, 2010 U.S. Dist. LEXIS 123895, at *9-10 (W.D. Mich. Nov. 23, 2010) (rejecting defendant's bald assertion that federal wiretapping statute provides exclusive remedy where plaintiffs alleged that their phone conversations were intercepted); Frierson v. Goetz, 99 F. App'x 649, 654 (6th Cir. 2004) (analyzing validity of wiretap act and privacy act claims under different standards for same conduct).

Prior to the Massachusetts' trial court decisions in the Fiduciary Dispute and in this matter,[5/] no Massachusetts state court had determined that the Wiretap Act was the exclusive remedy for a person recorded without his or her consent. The sole decision cited by the trial court in support of its holding is a federal trial court decision that lacks precedential value. Tedeschi v. Reardon, 5 F. Supp. 2d 40, 46 (1998). The Tedeschi decision has never been cited for this purpose before and the only support cited by Tedeschi holding that the Wiretap Act is an exclusive statutory remedy is Charland v. Muzi Motors, Inc., 417 Mass. 580, 585-586 (1994). The Charland decision does not discuss the Wiretap Act, but holds that where applicable G.L. c. 151B is the exclusive remedy for employment discrimination claims. Charland, 417 Mass. at 559. Notably, Charland held that G.L. c. 151B did not preclude claims based on preexisting tort law or constitutional protections. Id. at 586.

The Tedeschi decision is inconsistent with the Supreme Judicial Court's guidance in Passatempo,

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5/ RA 124-139 (Fiduciary Dispute Memorandum of Decision and Order on Defendant's Motion to Dismiss); RA 115-121 (adopting ruling in Fiduciary Dispute).

Lipsitt, and the fundamental tenets of statutory construction. The trial court erroneously relied on it to conclude that the Wiretap Act was Appellants' exclusive remedy.

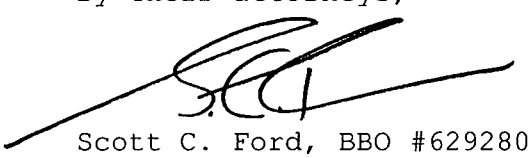
CONCLUSION

Appellants respectfully request that the Court reverse the trial court's dismissal of their Wiretap Act and Privacy Act claims for the aforementioned reasons, hold that Appellants have sufficiently alleged claims under both the Wiretap Act and Privacy Act, and remand this matter to the Superior Court so that Appellants may prosecute their claims.

Respectfully submitted,

MATTHEW Q. CHRISTENSEN and
KIRK P. ALLEN,

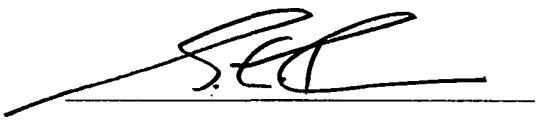
By their attorneys,



Scott C. Ford, BBO #629280
Alec J. Zadek, BBO #672398
Mackenzie A. Queenin, BBO #688114
Patrick E. McDonough, BBO # 685847
Mintz, Levin, Cohn, Ferris, Glovsky
And Popeo, P.C.
One Financial Center
Boston, MA 02111
Tel: (617) 542-6000
Fax: (617) 542-2241

CERTIFICATE OF COMPLIANCE

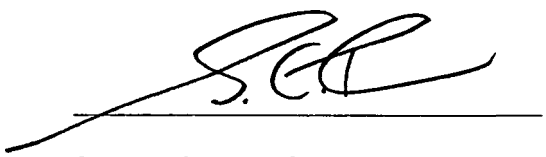
Pursuant to Massachusetts Rule of Appellate Procedure 18(k), I hereby certify that this brief filed by Appellants Matthew Q. Christensen and Kirk P. Allen complies with all relevant rules of court that pertain to the filing of briefs in the Appeals Court, including but not limited to: Mass. R. App. P. (16)(a)(6), Mass. R. App. P. 16(e), Mass. R. App. P. 16(f), Mass. R. App. P. 16(h), Mass. R. App. P. 18, and Mass. R. App. P. 20.



Scott C. Ford

CERTIFICATE OF SERVICE

Pursuant to Massachusetts Rule of Appellate Procedure 19(b), I hereby certify that I have served two copies of the foregoing brief and record appendix on counsel of record for the appellee, Shawn E. Cox, in this matter.



Scott C. Ford